BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM J. MIKESELL Claimant	)	
VS.	)	
KEIM TS INC. Respondent	)	Docket No. **1,050,066**
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the June 22, 2011 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on October 11, 2011. The Director appointed E.L. Lee Kinch of Wichita, Kansas, to serve as a Board Member Pro Tem in place of former Board Member Julie A.N. Sample.

APPEARANCES

George H. Pearson of Topeka, Kansas, appeared for the claimant. Jason M. Lloyd of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed the evidentiary record also includes the deposition of William Mikesell, dated February 14, 2011. Respondent's brief to the Board listed two preliminary hearings as part of the evidentiary record. However, at oral argument the parties agreed that listing was an error as no preliminary hearings were held in the litigation of this claim. The parties further agreed Mikesell has a 10 percent functional impairment. Finally, the parties agreed that if Mikesell is entitled to a work disability, his wage loss is 34 percent beginning on March 4, 2011.

ISSUES

It was undisputed William J. Mikesell suffered a work-related injury to his cervical spine on October 23, 2009. The parties were unable to agree on the nature and extent of disability caused by the accident and litigated that issue. The Administrative Law Judge (ALJ) found Mikesell suffered a 10 percent functional impairment followed by a 38.5 percent work disability based upon a 34 percent wage loss and a 43 percent task loss.

Respondent requests review of the nature and extent of Mikesell's disability. Respondent argues that the more persuasive evidence established Mikesell does not have any permanent restrictions and therefore has not suffered a task loss.

Mikesell argues that his expert's task loss opinion is uncontradicted and the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

William Mikesell began working for respondent as an over-the-road truck driver in February 2005. His job duties required him to secure tarps over the bed of the truck and then remove the tarp upon delivery of the load. He also had to load and unload the contents. On October 23, 2009, Mikesell was pulling on a 100-pound tarp in order to remove it when he injured his neck, back and right shoulder. After folding the tarps and putting them away, he had increased pain throughout the remainder of the day. Mikesell reported his injury, that same day, to his dispatcher. Respondent referred Mikesell for medical treatment with Dr. Christian Tramp. The doctor diagnosed Mikesell as having a cervical strain or sprain so he ordered steroid injections and physical therapy three times a week for four weeks. Also a cervical spine MRI was ordered. The MRI showed a right central disc herniation at C5-6 and a protrusion at C6-7. Mikesell was off work for approximately four weeks and then he returned to light-duty work for a couple of weeks. After conservative treatment Mikesell reported significant improvement. Dr. Tramp then released Mikesell to return to full-time work on December 9, 2009, performing his same job with respondent.

But Mikesell testified that as he continued working for respondent, the placing of tarps on the loads exacerbated his neck pain and he resigned from his job with respondent on February 11, 2011. Mikesell thought he had found another truck driving job that would be local and less physically demanding. He testified:

> Q. And why did you resign from your job with Keim Transportation?
>
> A. The tarping really bothered me. It hurt a lot. And this new job is not much physical activity in comparing. And it's going to be less hours. Forty-two hours instead of seventy.[1]

Mikesell interviewed for a job with Advance Foods. The truck driving job involved shuttling trailers and hauling food locally so it would be less physically demanding. But he was not able to pass the physical.[2]

Dr. P. Brent Koprivica examined and evaluated Mikesell on July 17, 2010, at Mikesell's attorney's request. Dr. Koprivica is board certified in occupational and emergency medicine as well as independent medical examinations. The doctor reviewed the medical records provided and took a history of Mikesell's accidental injury. Upon physical examination, Dr. Koprivica found Mikesell's physical presentation was representative of his residual impairment. Mikesell had cervicothoracic pulling and pain with the cervical motion testing but no evidence of myelopathy. Dr. Koprivica diagnosed Mikesell with cervical radiculopathy due to persistent complaints of neck and right upper extremity intermittent radicular symptoms. Based on the AMA *Guides*[3], Dr. Koprivica opined Mikesell has a 15 percent whole body functional impairment. No restrictions were placed on claimant at the time of this initial examination because Mikesell was working for respondent and earning a comparable wage. And Dr. Koprivica testified that he did not want to put Mikesell at risk of being fired by imposing work restrictions.

On October 14, 2010, the ALJ ordered an independent medical examination of Mikesell by Dr. Edward Prostic. The order provided in pertinent part:

> That the claimant is referred for an independent medical examination and recommendations per K.S.A. 44-510e(a) and/or K.S.A. 44-516, to be paid as assessed as costs to the parties, with costs being paid initially by respondent and insurance carrier, to Dr. Edward Prostic, 7301 Mission Road, #119, Prairie Village, KS 66208, (913) 831-0021, for evaluation and disability rating regarding an alleged work-related injury sustained by claimant allegedly with this respondent, and recommendations regarding what future medical treatment is appropriate, if any. Restrictions are to be imposed and opinions concerning apportionment of any pre-

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[1] Mikesell Depo. at 11-12.

[2] Mikesell did not pass the physical for the truck driving job he thought he had obtained when he resigned working for respondent. But he did obtain another job starting March 4, 2011. The parties stipulated his wage in that job calculates to a 34 percent wage loss.

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

> existing impairment of the affected body parts, together with opinions concerning loss of task-performing ability, if any, are to be given as appropriate.[4]

On November 19, 2010, Dr. Prostic performed a physical examination of Mikesell. The doctor reported that Mikesell's injury to his cervical spine is consistent with a cervical sprain and strain. Dr. Prostic further opined Mikesell was at maximum medical improvement and did not need additional medical treatment. Dr. Prostic's report provided; "No restrictions are necessary at this time". Based on the AMA Guides, the doctor opined Mikesell should be placed in the Cervicothoracic DRE Category II, which provides a 5 percent permanent functional impairment to the body as a whole due to the cervical injury.[5]

Initially, this claim was litigated seeking compensation for a functional impairment as Mikesell continued working for respondent at the same pre-injury average weekly wage. But after his resignation to find a less physically demanding job he then sought additional evidence to establish a work disability.[6]

Mr. Richard Santner, a vocational rehabilitation counselor, conducted a personal telephone interview with Mikesell on February 21, 2011, at the request of Mikesell's attorney. He prepared a task list of 23 nonduplicative tasks Mikesell performed in the 15-year period before his injury. At the time of the interview, Mikesell was unemployed.

On April 15, 2011, Dr. Koprivica was asked to again evaluate Mikesell regarding permanent work restrictions as well as Mikesell's task loss. Dr. Koprivica reviewed the list of Mikesell's former work tasks prepared by Mr. Santner and concluded Mikesell could no longer perform 10 of the 23 tasks for a 43 percent task loss.

Dr. Koprivica placed permanent restrictions on Mikesell of limited occasional lifting and carrying activities to a maximum of 40 pounds or less. Mikesell should also avoid frequent or constant lifting or carrying; occasional lifting over head to less than 30 pounds; avoid frequent or constant lifting overhead; avoid repetitive overhead reaching or sustained activities above shoulder girdle level; and, avoid repetitive overhead lifting. Dr. Koprivica opined that these restrictions should help Mikesell avoid further aggravating injury to the impairing conditions.

As previously noted, at the time Dr. Koprivica first examined Mikesell, he was asked not to impose permanent work restrictions as Mikesell had returned to work for respondent and he apparently did not want to jeopardize his employment. Dr. Koprivica testified:

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[4] ALJ Order (Oct. 14, 2010) at 1.

[5] Dr. Prostic's November 19, 2010 report is part of the evidentiary record but he was not deposed.

[6] See K.S.A. 44-510e(a).

> Q. Okay. So, Doctor, is it safe to assume that those permanent work restrictions that you opined on April 15, 2011 were not solely to prevent additional injury or to look out for the welfare of Mr. Mikesell because he would have done that in July 17th, 2010, correct?
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> **MR. PEARSON**: Let me object since he wouldn't have since I specifically, at Mr. Mikesell's request, asked him not to on the July 2010 exam.
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> **THE WITNESS**: Could you read back the question to me?
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> **MR. PEARSON**: Go ahead if you can.
>
> (Thereupon, the court reporter read back the following question:
> Q. So, Doctor, is it safe to assume that those permanent work restrictions that you opined on April 15, 2011 were not solely to prevent additional injury or to look out for the welfare of Mr. Mikesell because he would have done that in July 17th, 2010, correct?)
>
> **THE WITNESS:** Those restrictions were appropriate in July of 2010 I just didn't express them. And I can't -- I don't recall our interaction, but what I normally do where I'm going to be silent on restrictions is I have a discussion with the patient so they're aware of the risk of exceeding those restrictions. What he testifies to we talked about I would accept, because I don't remember.[7]

On June 14, 2011, a stipulation was received in the ALJ's office. The parties agreed that Mikesell's base average weekly wage was $1,117.95. He also had fringe benefits contributed by respondent of $123.91 per week which terminated on February 28, 2011, whereupon the average weekly wage would become $1,241.86.

It was undisputed that as a result of his work-related accidental injury Mikesell suffered a 10 percent permanent functional impairment to his cervical spine. Because Mikesell suffered an "unscheduled" injury, his permanent partial general disability is determined by the formula set forth in K.S.A. 2010 Supp. 44-510e(a). That statute provides in pertinent part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall

[7] Koprivica Depo. (May 10, 2011) at 50-51.

> not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

There is no dispute Mikesell suffered a 10 percent functional impairment. There is a dispute regarding the percentage of his task loss, if any. Dr. Koprivica opined Mikesell suffered a 43 percent task loss. The ALJ ordered Dr. Prostic to perform an independent medical examination of Mikesell. The ALJ's Order Referring Claimant For Independent Medical Evaluation specifically requested the doctor to impose restrictions as appropriate and offer an opinion regarding loss of task performing ability, if any. Dr. Prostic did not impose any restrictions and as a result did not offer a task loss opinion.

Claimant argues that Dr. Prostic's report cannot be considered as a 0 percent task loss opinion. The Board disagrees. A task loss is determined by a physician applying restrictions to the injured worker which the doctor then uses to determine which physical tasks (from a list of tasks the injured worker performed in the 15 years preceding the accident) the injured worker can still perform. It goes without saying that if there are no physical restrictions applied, then the injured worker can still perform the previous physical job tasks and has no task loss. Dr. Prostic was specifically asked to address any potential task loss Mikesell suffered but did not because he did not impose any permanent restrictions. Simply stated, Dr. Prostic's report established Mikesell had a 0 percent task loss.

The fact that Mikesell continued working for respondent and then applied for and ultimately found another truck driving job supports Dr. Prostic's opinion. However, the fact that continued work for respondent increased Mikesell's pain and led him to seek less physically demanding employment supports Dr. Koprivica's opinion. Affording some weight to both, the Board will average the task loss opinions and finds Mikesell has suffered a 21.5 percent task loss.

Because Mikesell continued working for respondent his compensation initially is limited to his temporary total disability compensation and compensation for his 10 percent functional impairment. But after his resignation from employment with respondent, commencing February 11, 2011, Mikesell suffered a 100 percent wage loss.[8] The work disability formula requires that the percentage of wage loss and task loss be averaged to arrive at the work disability. Thus, Mikesell would be entitled to a 60.75 percent work disability from February 11, 2011 through March 3, 2011. The parties stipulated that starting March 4, 2011 Mikesell suffered a 34 percent wage loss. Accordingly, commencing March 4, 2011 Mikesell is entitled to compensation for a 27.75 percent work disability. As previously noted, there were periods of time when claimant's wage loss

[8] See *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

changed. Generally, whenever there is no gap in disability benefits, the total disability compensation award is the same as if the award were calculated using only the last percentage of permanent impairment. There would be no difference in compensation had this award been calculated using the various changed percentages of wage loss and resultant work disabilities. Because of this, the Board sometimes will only show the abbreviated calculation, but with an explanation that although the percentage of disability changed it makes no difference in the award. That is the case here.

The Board notes that the parties stipulated that claimant had a base wage of $1,117.95 and fringe benefits provided by respondent which terminated February 28, 2011. The Board is mindful that K.S.A. 44-511(a)(2) requires a recalculation of the average weekly wage to include the fringe benefits when discontinued. In this instance, under either the base wage or the recalculated wage including the fringe benefits, Mikesell's weekly compensation rate is limited to the maximum rate of $546.[9]

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[10] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated June 22, 2011, is modified to reflect Mikesell is entitled to compensation for a 10 percent functional impairment followed by a 27.75 percent work disability.

Claimant is entitled to 4 weeks of temporary total disability compensation at the rate of $546 per week or $2,184 followed by 41.50 weeks of permanent partial disability compensation at the rate of $546 per week or $22,659 for a 10 percent functional disability followed by 73.66 weeks of permanent partial disability compensation at the rate of $546 per week or $40.218.36 for a 27.75 percent work disability, making a total award of $65,061.36.

As of November 10, 2011, there would be due and owing to the claimant 4 weeks of temporary total disability compensation at the rate of $546 per week in the sum of $2,184 plus 80.50 weeks of permanent partial disability compensation at the rate of $546 per week in the sum of $43,953 for a total due and owing of $46,137, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the

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[9] K.S.A. 44-510e(a)(1).

[10] K.S.A. 2010 Supp. 44-555c(k).

amount of $18,924.36 shall be paid at the rate of $546 per week for 34.66 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Jason M. Lloyd, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge